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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK C. LAMBERT,

)

Petitioner and Appellant,

)

vs.

)

No. 22063

LAWRENCE E. WILSON, Warden,

)

California State Prison,

)

San Quentin, California, et al.,

)

Respondents and Appellees.)

)

APPELLEES' BRIEF

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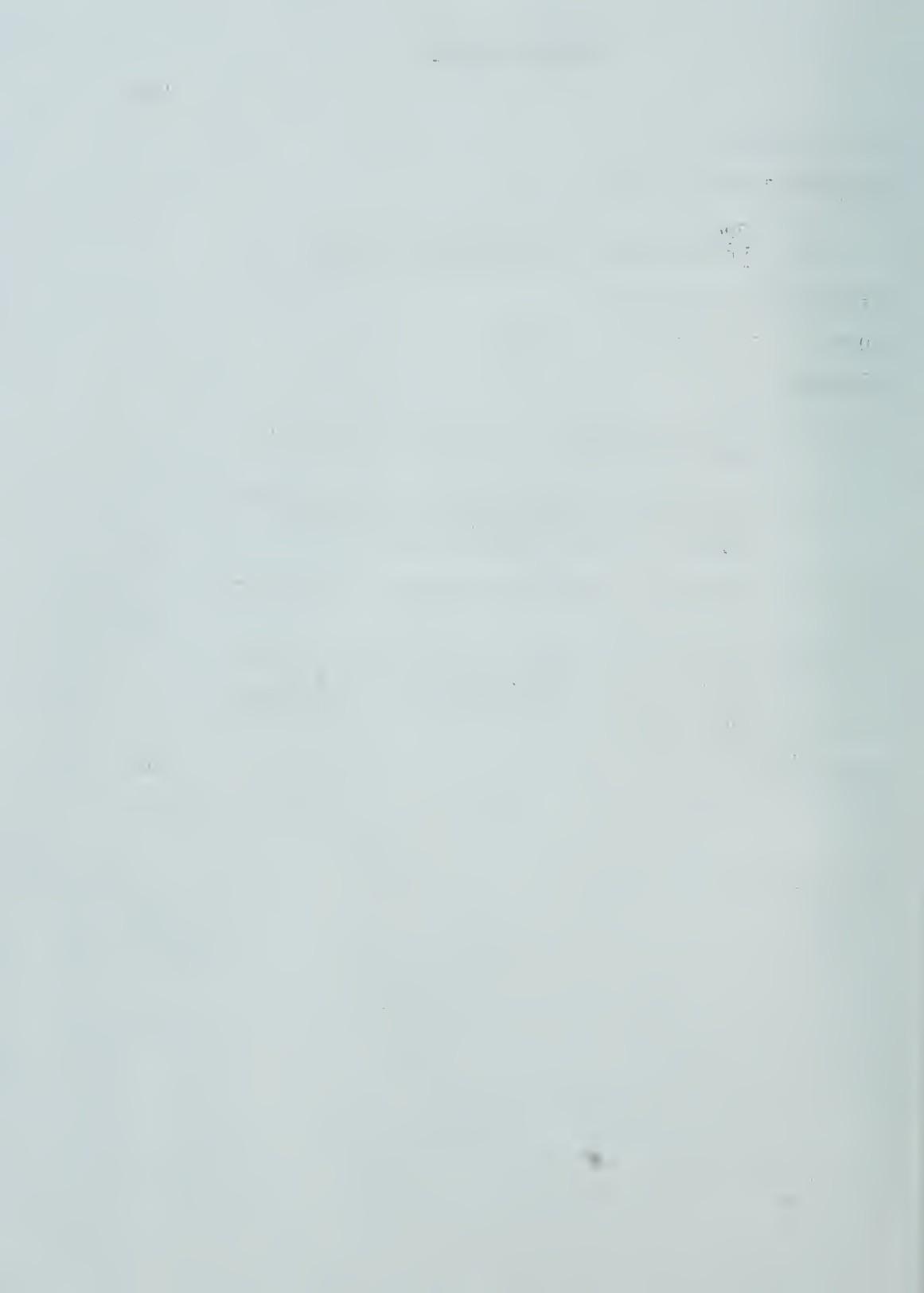


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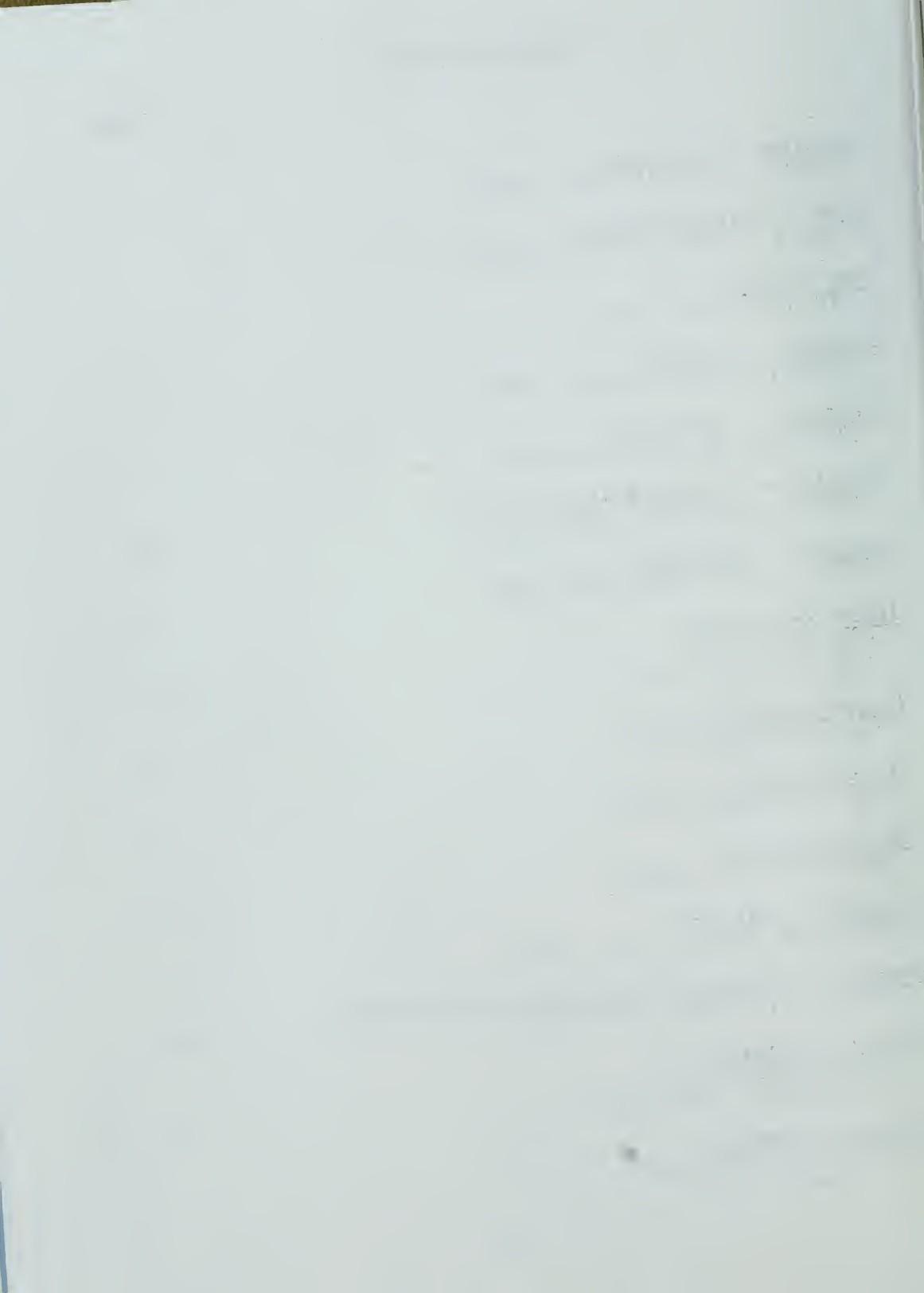


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San Quentin, California, et al.,)
Respondents and Appellees.)

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APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On September 4, 1962, appellant, a prisoner at San Quentin State Prison was convicted in the Superior Court of Los Angeles County of first degree murder (California Penal Code section 187) and sentenced to life imprisonment (lRT 46). ^{1/}

1. "lRT" refers to Volume One of the Transcript of Record on Appeal.

Appellant failed to perfect a timely appeal from the judgment of conviction and has not sought relief therefrom under 31(a) of the California Rules of Court.

An application for writ of habeas corpus to the California Supreme Court was denied on December 20, 1965.

B. Proceedings in the Federal Courts

Appellant filed a petition in forma pauperis for a writ of habeas corpus (No. 44855) in the District Court on March 7, 1966; and an order to show cause was issued on April 14 (lRT 1, 32). An evidentiary hearing was held before Judge Wollenberg on March 3, 1967; ^{2/} and briefs were filed by all parties (lRT 80, 96). On June 8, 1967, the order to show cause was discharged and the petition was dismissed (lRT 106-109). Orders were rendered on July 7 denying appellant's motion for a rehearing and granting his application for certificate of probable cause and for leave to appeal in forma pauperis (lRT 113-115). Appellant filed a notice of appeal to this Court on July 20 (lRT 116).

APPELLANT'S CONTENTIONS

1. Appellant was denied his Fifth, Sixth and Fourteenth Amendment rights to due process, to the effective assistance of counsel and to present witnesses in his own behalf.

2. "2RT" refers to Volume Two of the Transcript of Record on Appeal, which contains the Reporter's Transcript of the proceedings at the hearing on March 3, 1967, on the order to show cause.

a. Trial counsel's failure to investigate thoroughly the facts of the case resulted in the presentation of a defense which was so unreasonable, as compared to other defenses available, that appellant was denied the effective assistance of counsel.

b. Appellant was denied due process in his right to present witnesses in his own behalf in that, as a consequence of his lack of participation in and consent to the defensive theory of intoxication, an essential defense was eliminated from the case.

2. There is no basis upon which to disqualify appellant from relief in federal habeas corpus.

a. The deliberate by-pass rule cannot apply in this case to bar appellant's claim for relief in that he was denied the assistance of counsel in perfecting an appeal.

b. Appellant's alleged improper use of available state procedures, as the consequence of not being provided with the assistance of counsel, cannot operate to bar him from relief in federal habeas corpus.

SUMMARY OF APPELLEES' ARGUMENT

I. Appellant has not exhausted available state remedies.

II. Appellant did not have a constitutional right to be represented by counsel between conviction and appeal.

III. Appellant received effective assistance of counsel.

IV. Appellant had no constitutional right to consent to and/or participate in the choice of defenses to be presented at trial.

ARGUMENT

I

APPELLANT HAS NOT EXHAUSTED AVAILABLE STATE REMEDIES.

Under the doctrine of Fay v. Noia, 372 U.S. 391 (1963), in determining whether a petitioner is precluded from relief on the grounds of waiver, the issues become (1) whether the State of California has provided petitioner with an orderly remedy by which to vindicate his asserted constitutional right, and (2) whether petitioner made a considered choice to abandon the privilege of seeking to vindicate that Federal right in the State courts. Fay v. Noia, supra at 439; Gladden v. Gidley, 337 F.2d 575, 579 (9th Cir. 1964).

The California law is well settled that the writ of habeas corpus cannot substitute for an appeal. In re Lessard, 62 Cal.2d 497, 503 (1965); In re Waltreus, 62 Cal.2d 218, 225 (1965); In re Mitchell, 56 Cal.2d 667, 671 (1961). A similar rule is applicable in Federal proceedings, see Dodd v. United States, 321 F.2d 240, 243 (9th Cir. 1963). As pointed out in Townsend v. Sain, 372 U.S. 293, 317 (1963):

"The standard of inexcusable default set down in Fay v. Noia . . . does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures."

Under California law to effect a timely appeal, notice of appeal should have been filed within ten days following rendition of the judgment. Rule 31, California Rules of Court. Judgment of conviction was rendered against petitioner on September 4, 1962. Appointed counsel Littlefield testified that, probably on the day of the conviction, he had discussed the subject of appeal with appellant and told him that the public defender's office ". . . would not take an appeal in the case and advised him that the notice of appeal would have to be filed within 10 days after the date of the sentence." (2RT 159:25-160:3). This discussion took place in the detention room next to the courtroom (2RT 160-161, 196, 197). The public defender's office was authorized to take appeals only in cases where it was felt that there was some substantial question of law or other reason that an appeal should be taken; not, as here, where there was merely a question of fact or credibility of witnesses (2RT 193-195).

Appellant denied that Littlefield had advised him that he had a right to appeal, which, he testified, was the reason he failed to file a timely notice of appeal. After discussing his case with his fellow inmates at Chino, who advised him regarding the procedure for taking an appeal, he allegedly wrote letters to both Littlefield and Judge Dawson, the Presiding Judge of the Superior Court. However, the prison records show that on October 4, 1962, a letter was sent only to the Superior Court (2RT 37-40).

Littlefield testified that he had seen the letter

to Judge Dawson, which stated that he had never advised appellant of his right to appeal. Littlefield remembered that he had in fact so advised appellant and, as a result, continued to remember it at the time of the evidentiary hearing (2RT 160). On October 14, 1965, petitioner attempted to file a notice of appeal with the Clerk of the Los Angeles County Superior Court; but the Clerk refused to file the late appeal and explained the proper procedure to be taken to effect late filing under California Rule of Court 31(a) (2RT 41).

Doubtless, upon further discussion of his case with other prisoners, it was pointed out to appellant that he was fortunate indeed to have received only a life imprisonment sentence under the first degree murder conviction; and that, under the California law at that time, if retried, there was a real possibility that he might receive the death penalty (2RT 161, 194). For a case which did not present strong grounds for appeal, this would surely have provided good reason for a decision to deliberately by-pass this state remedy of appeal. And, even before appellant wrote the letter to Judge Dawson, the 10 day period within which to file notice of appeal had expired.

Relief under Rule 31(a) was a remedy available at the time appellant's application for relief was filed in the District Court and remains available at this time. Three years after his conviction, the court clerk explained to appellant how to effect a late filing of an appeal. Appellant

did not file notice of appeal and he has not attempted at any time to so perfect an appeal from that judgment by seeking relief in the California courts from his failure to file a timely notice of appeal. Under Rule 31(a) of the California Rules of Court persons seeking to reinstate their right to appeal may file affidavits with the court explaining their failure to file a timely notice of appeal. The California Supreme Court has shown liberality in interpreting this rule so as to grant relief in a number of cases where good cause has been shown. See People v. Davis, 62 Cal.2d 806 (1965).

The doctrine of Fay v. Noia is consistent with the holding that appellant's failure to pursue California procedures to seek relief from his failure to file a timely notice of appeal constitutes a failure to exhaust available State remedies. See Holley v. Cheuvront, 351 F.2d 615 (9th Cir. 1965); Gravette v. Maxwell, 340 F.2d 95 (6th Cir. 1965).

As specifically provided in Title 28 United States Code section 2254, "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." Therefore, until appellant seeks relief from his failure to file a timely notice of appeal pursuant to Rule 31(a) or otherwise demonstrates that such relief is not available to him, he has not exhausted State remedies that were available at the time his petition was filed and remain available at this time.

We submit that the finding of the District Court that appellant is foreclosed from the relief he seeks because of his failure to exhaust available state remedies is correct (lRT 108).

II

APPELLANT DID NOT HAVE A CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL BETWEEN CONVICTION AND APPEAL.

Appellant contends that failure to provide him with counsel during the interim between imposition of sentence and the filing of an appeal was a deprivation of his constitutional right to counsel. We submit that appellant is foreclosed from raising this argument for the first time on appeal.

Moreover, neither the federal nor the California Courts have held that the advice of counsel at that stage of the proceedings is a constitutionally protected right; in fact, the California courts have actually ruled that it is not and have set forth persuasive reasoning for their views. In People v. Riser, 47 Cal.2d 594, 596, 305 P.2d 18 (1956), the court pointed out that the state has no duty to see that every convicted prisoner perfects an appeal, nor is it responsible should the public defender fail to act. And in In re Gonsalves, 48 Cal.2d 638, 645, 311 P.2d 483 (1957), it was noted that the courts of California are alert to protect the right of an imprisoned defendant, acting in propria persona, to appeal from a judgment of conviction of crime where he diligently attempts to timely initiate and

prosecute such an appeal. See also Joseph v. Klinger, 378 F.2d 308 (9th Cir. 1967).

In the Gonsalves case, the court relieved the appellant from default in preparation of the record because it was clear that he had taken every step he could possibly take to perfect his appeal and done all that he could in compliance with jail rules to institute an appeal. That situation is clearly distinguishable from the one at hand where there is evidence that appellant was timely advised by counsel of the procedure for perfecting an appeal. Counsel made it clear that he could not represent appellant on appeal or file the appeal for him. Appellant did not file an appeal within the 10 day limit after imposition of sentence. When, three years later, he did attempt to send a notice of appeal to the Superior Court Clerk, he received notice of the procedure to be followed in effecting a late appeal (RT 40-41); yet, appellant has never attempted to pursue this remedy.

In point is People v. Hatten, 64 Cal.2d 224, 228, 49 Cal.Rptr. 373 (1966), where it was recently held that:

"Thus, the question presented is whether a defendant is entitled to relief where the record shows no promise or request to appeal, but does show he was ignorant of his appeal rights during the critical 10-day period, and as a result failed to request the attorney to take an appeal. Strong arguments of policy can be made

in support of such a right. An indigent defendant is entitled to counsel at trial, if he so desires. (Gideon v. Wainwright, 372 U.S. 335, 343, [83 S.Ct. 792, 9 L.Ed.2d 799]; Johnson v. Zerbst, 304 U.S. 458, 465, [58 S.Ct. 1019, 82 L.Ed. 1461].) Likewise, an indigent is entitled to counsel on appeal. (Douglas v. California, 372 U.S. 353, [83 S.Ct. 814, 9 L.Ed.2d 811].) It can be argued that an indigent should be entitled to advice of counsel during the period after sentence and before the notice of appeal must be filed. But neither this court, nor the federal courts, have as yet held that, in the absence of a request, the defendant must be advised either by the court or trial counsel of his right to appeal, or of his other rights to review, directly or collaterally, the trial proceedings. Certainly, in the absence of request, he need not be informed of his right to petition for coram nobis or habeas corpus, or of his right to certiorari to the United States Supreme Court. The right now claimed is comparable to those rights. If the rule is to be extended it should be extended by rule or by statute, and not by judicial decision."

APPELLANT RECEIVED EFFECTIVE ASSISTANCE
OF COUNSEL.

At the evidentiary hearing held in the United States District Court for the Northern District of California before Judge Wollenberg on March 3, 1967, the following evidence was disclosed:

From 1957 until the time of the hearing Wilbur Francis Littlefield had been employed in the Los Angeles Public Defender's Office. Prior to joining that office, he had engaged in criminal defense work while in private practice (2RT 142). In the Public Defender's Office, murder cases were assigned to the more experienced attorneys; and, at the time Littlefield was assigned to defend appellant, he was among the most experienced lawyers in his office, having attained the top pay grade (2RT 142-143). He entered the case in June, 1962, and saw appellant between three and twenty times, during which times all issues were covered (2RT 142, 145, 147, 162).

At his attorney's request, appellant wrote out three statements describing the background situation and all of the details of the murder (2RT 68-69, 146, 13). Littlefield had also seen a copy of the confession (2RT 176, 197). Upon his arrest, the police found two or three liquor bottles in the car (2RT 132, 134) and an open bottle of whiskey fell from appellant's inside coat pocket (2RT 56-57, 124). It had been evident to the police that he had



been drinking; and he told them that he had had two or three drinks prior to going to the real estate office where he killed his wife (2RT 129, 135-137). He also told his attorney that he had been drinking at the time of the murder (2RT 77, 79, 81, 187). Appellant testified that he had had a life-long history of an acute alcoholic problem (2RT 15, 20, 29, 80, 168).

Littlefield considered calling various witnesses, but rejected them for the following reasons. Appellant had asked that Littlefield call his stepdaughter Nancy, but advised it might be wiser to speak to her later after the shock of the murder had faded (2RT 169-170). The attorney did in fact speak with Nancy during the trial (2RT 84), but decided not to call her as a witness because he did not feel that she had had sufficient contact with appellant to be able to testify as to his state of sobriety on the day of the murder. Moreover, appellant had asserted that his wife had been having an affair, but his father and brother indicated that it wasn't true; and Littlefield did not want to introduce any evidence which might supply a motive for appellant to have committed the crime (2RT 174-175, 159). Similarly, he decided not to call character witnesses since the statements given by appellant indicated that he had made previous threats on the victim's life; and Littlefield was afraid that if she had communicated these threats to some other persons it might be introduced in evidence against appellant. Littlefield also feared that reputation evidence might work to appellant's

detriment by causing the jury to feel that he had spent most of his time drinking, rather than working, while his wife had to support the family (2RT 155-156).

On May 11, 1962, appellant had been examined by two psychiatrists whose reports indicated that he was sane (2RT 33, 157-158, 178). In addition, Littlefield also learned that, prior to the murder, appellant had once seen a psychologist named Mr. Zweig and then failed to keep further appointments (2RT 156-157, 77). Zweig's diagnosis was that appellant had an inability to control his drinking problem and probably had a schizoid personality (2RT 23-24). Littlefield had spoken with one of the attorneys who had previously represented appellant, who advised that he didn't think that Zweig would be of any help (2RT 157, 171); and, as a result, Littlefield decided not to call Zweig as a witness. His other reason for not calling Zweig was (2RT 170:16-171:2):

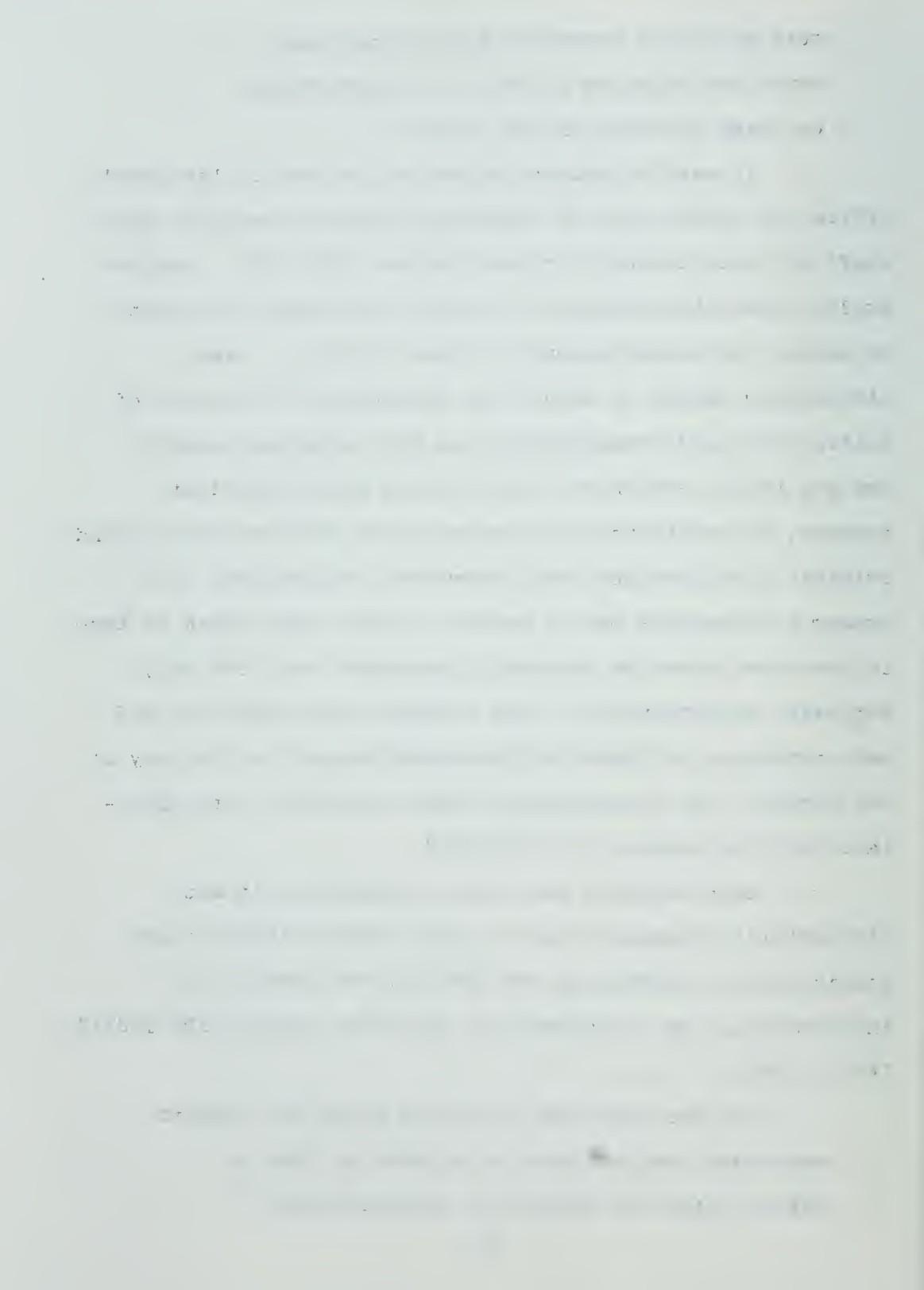
"First that Mr. Lambert had been examined by two psychiatrists shortly after this incident had taken place and generally, proper or not, the weight of the psychiatrist's testimony is generally held, their testimony is held in greater esteem than the testimony of a psychologist. And also I felt that evidence that Mr. Lambert had made but one appearance before Dr. Zweig and then had cancelled or failed to make, keep any other appointments that he had made, at least that is what he

told me in his statement that he had done,
would not help him so far as his appearance
or image in front of the jury."

It was the general policy of the Public Defender's Office for counsel not to interview witnesses as there was a staff of investigators for that purpose (2RT 191). Accordingly, Littlefield dictated a request outlining the points he wanted the investigators to check (RT 151). Since Littlefield wanted to negate the prosecution's theories of deliberation and premeditation and that appellant bought the gun on the afternoon of the murder solely for that purpose, he instructed the investigative staff to try to find evidence that appellant was interested in guns and, on a number of occasions over a period of time, had looked at them in the store where he eventually purchased one (2RT 152). Moreover, he attempted to find evidence that appellant had made purchases of liquor at two establishments on the day of the murder. The investigators spoke personally with appellant for this purpose (2RT 153-154).

Upon learning the above information, it was Littlefield's judgment that the only defense that had any possibility of convincing the jury was the defense of intoxication. He explained this defensive theory (2RT 148:19-149:3, 196):

"At the time that this took place Mr. Lambert was under the influence of alcohol so that he did not have the ability to deliberate and



premeditate, that hopefully was the fact that this incident took place between himself and his wife was a result of a sudden quarrel or heat of passion which would have reduced the crime to voluntary manslaughter or if not he was enough under the influence of alcohol so that it would remove the deliberation and premeditation part and make it a second degree rather than a first."

Littlefield was aware at that time of the Wells-Gorshen rule in California which pertains to diminished responsibility or capacity, and stated (2RT 188:23-189:8):

"A. My own feeling was that . . . what I was trying to do throughout the entire trial was to raise the issue of his diminished responsibility because of his drinking.

"Q. Because of alcohol?

"A. Yes, sir.

"Q. I see. Were you familiar with that evidence of mental state, character disorders, various other kinds of information, would also have been relevant in the Wells-Gorshen Rule?

"A. Yes, sir."

To justify relief on the ground of constitutionally inadequate representation of counsel, an extreme case must be disclosed. It must appear that counsel's lack of diligence

or competence reduced the trial to a "farce or sham".

People v. Ibarra, 60 Cal.2d 460, 464, 34 Cal.Rptr. 863 (1963). The appellant has the burden, moreover, of establishing his allegation of inadequate representation not as a matter of speculation, but as a demonstrable reality. People v. Reeves, 64 Cal.2d 766, 775, 51 Cal.Rptr. 691 (1966). This appellant has failed to do.

To summarize, counsel discussed the facts of the case with appellant, who furnished lengthy written accounts of the circumstances. He directed his investigative staff to interview witnesses and check the facts. Moreover, he personally interviewed the family, who were not able to bear out ppellant's statements. He was aware of the existence of a psychologists' report and had seen the psychiatric reports, both of which said that appellant was sane. He was aware of the legal principles involved in the California Wells-Gorshen Rule. He had seen appellant's confession. He had been told by appellant of his long history of alcoholism and knew that the police had evidence of his drinking on the day of the murder. As a result of his knowledge of the facts and subsequent investigation, as well as his knowledge of the applicable legal principles, he decided to use the defense of intoxication. He rejected other possible defenses such as diminished capacity as he felt it better strategy to avoid introducing evidence of premeditation. He felt also that it was not necessary to introduce evidence of appellant's mental state at the penalty phase of the trial inasmuch as

the first time in the history of the world, the people of the United States have
gathered in their capital city to witness the inauguration of their President,
and the election of their Vice-President. The day has been one of great
interest and interest, and the people of the country have been gratified by the
choice of a man who is well qualified for the office. The new President
is a man of great ability and experience, and he will be a credit to his
country. He has a clear understanding of the principles of our Government,
and he will work hard to promote the welfare of the people. The Vice-
President is also a man of great ability and experience, and he will be a
valuable addition to the administration. The inauguration ceremony
was performed in a simple and dignified manner, and the people were
impressed by the solemnity of the occasion. The new President gave a
short speech, in which he expressed his thanks to the people for their
confidence in him, and he assured them that he would work hard to
serve them. The Vice-President also spoke, and he expressed his
thanks to the people for their support. The inauguration was followed
by a grand procession, in which many prominent men and women
participated. The procession passed through the streets of Washington,
and it was a sight to behold. The people were greatly impressed by
the grandeur and beauty of the procession, and they cheered the
new President and the Vice-President as they passed by. The
inauguration was a great success, and it will be remembered as
a day of great importance in the history of the United States.

or competence reduced the trial to a "farce or sham".

People v. Ibarra, 60 Cal.2d 460, 464, 34 Cal.Rptr. 863 (1963). The appellant has the burden, moreover, of establishing his allegation of inadequate representation not as a matter of speculation, but as a demonstrable reality. People v. Reeves, 64 Cal.2d 766, 775, 51 Cal.Rptr. 691 (1966). This appellant has failed to do.

To summarize, counsel discussed the facts of the case with appellant, who furnished lengthy written accounts of the circumstances. He directed his investigative staff to interview witnesses and check the facts. Moreover, he personally interviewed the family, who were not able to bear out ppellant's statements. He was aware of the existence of a psychologists' report and had seen the psychiatric reports, both of which said that appellant was sane. He was aware of the legal principles involved in the California Wells-Gorshen Rule. He had seen appellant's confession. He had been told by appellant of his long history of alcoholism and knew that the police had evidence of his drinking on the day of the murder. As a result of his knowledge of the facts and subsequent investigation, as well as his knowledge of the applicable legal principles, he decided to use the defense of intoxication. He rejected other possible defenses such as diminished capacity as he felt it better strategy to avoid introducing evidence of premeditation. He felt also that it was not necessary to introduce evidence of appellant's mental state at the penalty phase of the trial inasmuch as

he knew the prosecution was not planning to seek the death penalty (2RT 192).

The above evidence shows that trial counsel made a deliberate informed choice after undertaking the investigation and research essential to adequate trial presentation. After such investigation and research, trial counsel made reasonable decisions of tactics and strategy. There is no evidence that trial counsel failed to prepare, as alleged by appellant. This is not a case where the defense of diminished capacity was withheld in default of knowledge that reasonable inquiry would have produced and, hence, in default of any judgment at all so that the omission constituted a total failure to present the cause of the accused in any fundamental respect and resulted in a denial of the fair trial contemplated by the due process clause. Rather, the only possible valid allegation might be made is that a possible defense of appellant was withheld through faulty judgment. Such an allegation would not violate the standards set forth in Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), where it was held:

"Appellant was entitled to 'effective aid in the preparation and trial of the case.'

"This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless

counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; it is inevitably a question of judgment and degree."

See also Pinedo v. United States, 347 F.2d 142, 148 (9th Cir. 1965).

Appellant was accorded a defense which was supported by the evidence and reasonable in view of the information available to counsel; and the District Court correctly found that the record does not show that the standards set in Brubaker v. Dickson, supra, has been violated (lRT 109).

IV

APPELLANT HAD NO CONSTITUTIONAL RIGHT TO CONSENT TO AND/OR PARTICIPATE IN THE CHOICE OF DEFENSES TO BE PRESENTED AT TRIAL.

When Littlefield was asked at the evidentiary hearing whether he discussed in his meetings with appellant possible defenses that might be available, he replied unequivocably, "Yes, sir."; and he went on to say that it was decided that the defense would be that appellant had been under the influence of alcohol at the time of the murder

(2RT 147). But appellant's participation in or consent to the choice of defense was contradicted by appellant's testimony (2RT 14). Appellant now contends that such consent of and/or participation by the accused in the choice of a defense theory is constitutionally required by the due process clause and the right to present witnesses in his own behalf.

The District Court held that in making the decision regarding the appropriate defense to be offered at the time of trial, an adequate background investigation into the facts and a competent knowledge of the law are required. It was found that appellant received the reasonably adequate professional aid to which he was entitled (1RT 114).

In United States v. Follette, 275 F.Supp. 416, 420 (S.D. N.Y. 1967), the court observed that a client is rarely in a position to enable him to make a competent evaluation of the legal issues at trial. And People v. Adams, 249 Cal. App.2d 501, 509, 57 Cal.Rptr. 389 (1967), held that,

". . . an attorney has considerable discretion in the conduct, both tactically and substantively, of an accused's defense. [Citation.]

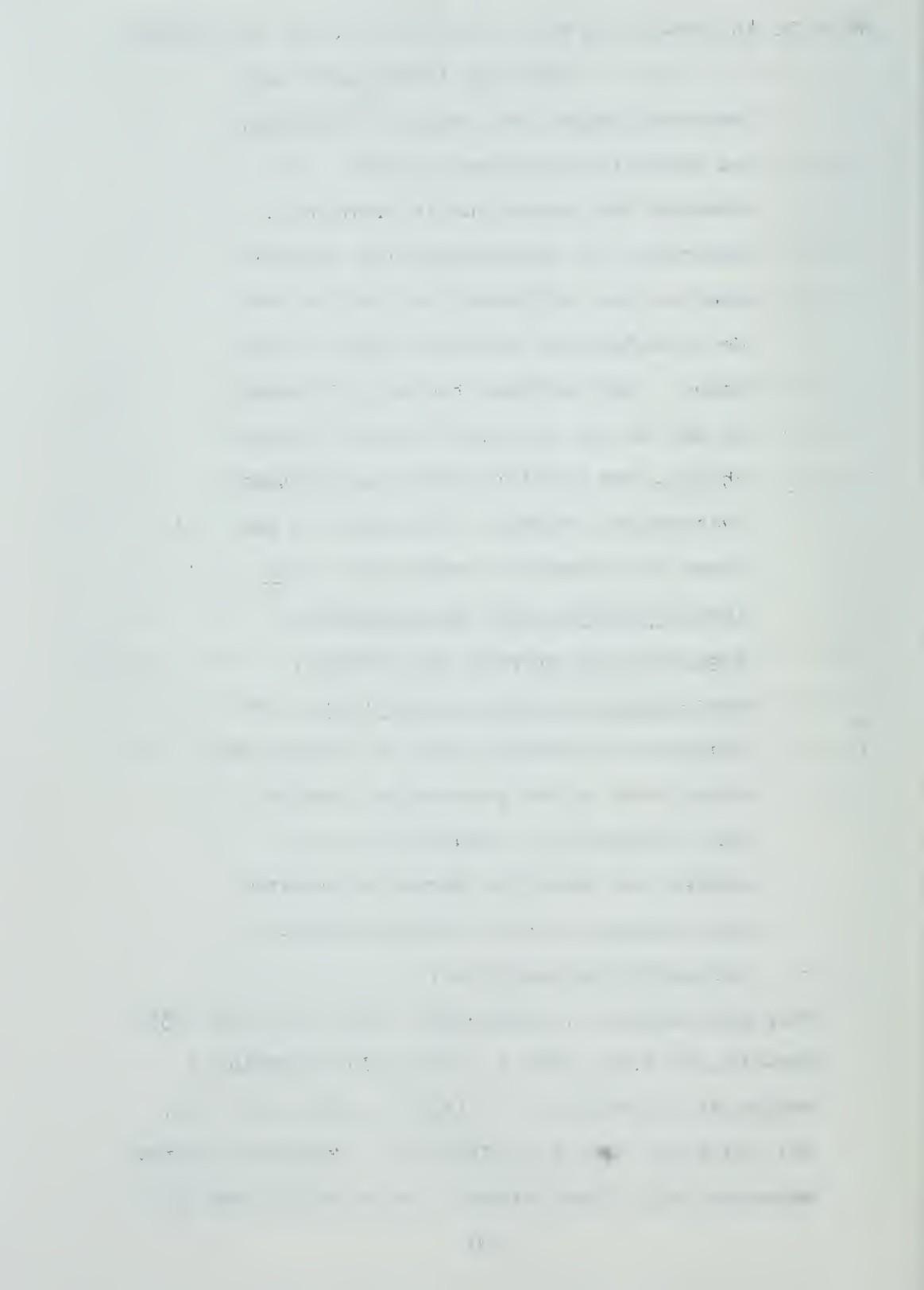
This is true both as to the kind of defense presented and the decision of when and whether to object to behavior of the prosecution."

(Emphasis added.)

In Rhay v. Browder, 342 F.2d 345, 348 (9th Cir. 1965), the court quoted from Powell v. State of Alabama,

"'. . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. . . .'

"See also Gideon v. Wainwright, 1963, 372 U.S. 335, 344-445, 83 S.Ct. 792, 9 L.Ed.2d 799; Douglas v People of the State of California, 1963, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811. We are in hearty agreement with these views. And we think that it



inevitably flows from them that, when a defendant has counsel, as Browder did, it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is of the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there." (Emphasis added.)

See also Wilson v. Gray, 345 F.2d 282, 289 (9th Cir. 1965); and White v. Hancock, 355 F.2d 262, 264 (1st Cir. 1966).

Similarly, in Nelson v. People of the State of California, 346 F.2d 73 (9th Cir. 1965), it was held that counsel's decision, although made without prior consultation with the accused, to by-pass the contemporaneous-objection rule as part of trial strategy precluded the accused from asserting constitutional claims. The court then went on to say at page 81:

"Does the fact that here there was prior consultation with the accused, and that he disagreed with counsel's strategy, make a legal difference? This question has not been before the Supreme Court. Our view is that the result should be the same. Our reasons are that only counsel is competent to make such a decision, that counsel must be the



manager of the law-suit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel. (See Rhay v. Browder, 9 Cir., 1965, 342 F.2d 345). One of the surest ways for counsel to lose a law suit is to permit his client to run the trial. We think that few competent counsel would accept retainers, or appointment under the Criminal Justice Act of 1964, to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right."

Appellant attempts to draw a distinction between decisions of strategy which occur during the trial, such as whether to object to the admission of evidence, and those decisions as to defense which occur prior to trial. He contends that all of the latter decisions are governed by the same rule of law which requires that a defendant personally enter his plea and that his counsel may not waive this right for him. However, for this Court to hold that defense counsel must consult with a defendant and secure his approval of the line of defense to be used in the case and, correspondingly, honor the defendant's ideas as to which

witnesses should be presented at the trial would wreak havoc upon the orderly trial of defendants in criminal cases.

In the case of a guilty plea, the defendant has only two choices. He can either plead guilty or not guilty; and if he refuses to make either plea, the court will automatically enter a plea of not guilty. Cal. Pen. Code § 1024. However, in deciding on a defense, there are many possible defenses which may be utilized in a criminal case. As stated by the cases cited above, only a trained attorney is in a position to judge the legal effect and relative desirability of choosing among these defenses. Moreover, if it were necessary to wait for a defendant to choose among the alternatives, he might never make up his mind, thus delaying the trial on criminal charges indefinitely. Such a rule would also undoubtedly open the door to post-trial complaints that a defendant had not been afforded proper information upon which to make an intelligent choice of defense and, therefore, had been deprived of his right in this regard; or that he had been unduly influenced by his attorney in making the choice.

Several decisions have involved the choice by counsel of strategy as to matters which did not occur in the heat of trial. In Hensley v. United States, 281 F.2d 605, 609 (D.C. Cir. 1960), it is held that the failure of trial counsel to consult with an accused regarding the waiver of jury trial and to call the accused's wife as a witness constituted tactical decisions in the trial of the case and did not amount to denial of effective assistance

of counsel to the accused. Similarly, People v. Watson, 244 Cal.App.2d 89, 95, 52 Cal.Rptr. 821, 825 (1966), held that a defendant has no constitutional right to be personally consulted before the trial court accepts a withdrawal by defense counsel of a motion for mistrial.

CONCLUSION

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: June 18, 1968

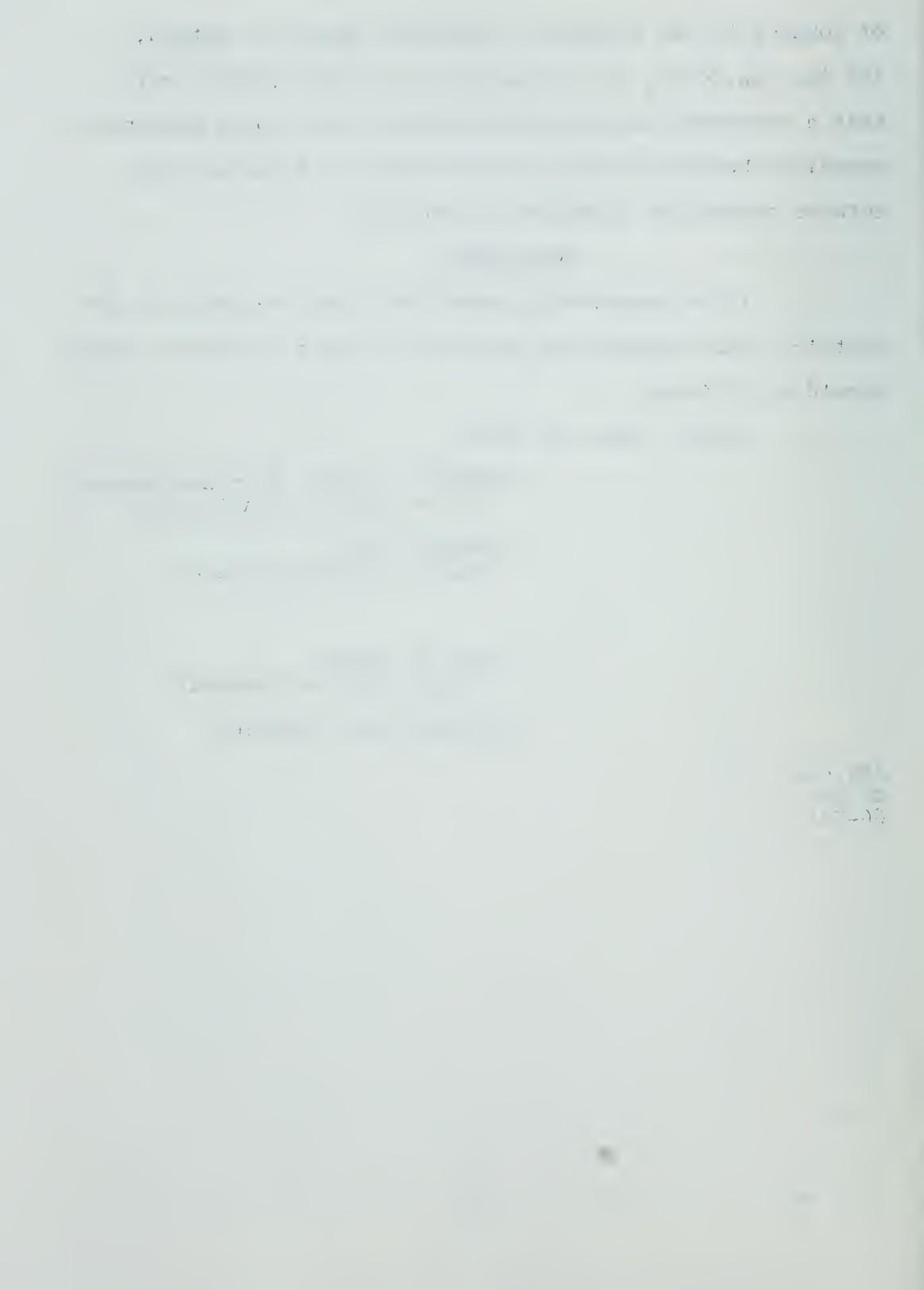
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: June 18, 1968

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